LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 4 1972
E. ROBERT SEAVER, CLERK

No. 71-815

In the Supreme Court of the United States

OCTOBER TERM, 1971

PHILIP DIORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-815

PHILIP DIORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts charging him with having made a false oath in connection with a bankruptcy proceeding, in violation of 18 U.S.C. 152. He was sentenced to concurrent prison terms of three months and fined $1,000. The court of appeals affirmed *per curiam* (Pet. App. 14-19).

The facts are not in dispute. On October 28, 1965, petitioner signed and swore to a "Statement of Affairs" (G.X. 1A) [1] which was subsequently annexed to and filed with his petition to initiate voluntary bankruptcy proceedings in the United States District Court for the Southern District of New York (Tr. 28-

[1] "G.X." refers to the government's exhibits at trial; "Tr." refers to the trial transcript.

30). In the "Statement of Affairs" petitioner stated that the only business he had engaged in in the last six years was the Elite Concrete Construction Corporation ("Elite") of which he had been an officer and an owner and which, he stated, was no longer in existence. At the first meeting of creditors he reaffirmed that he had not engaged in any business for himself after "Elite" ceased doing business (G.X. 2B; Tr. 34–35).

After this meeting the Trustee in Bankruptcy requested that petitioner submit an affidavit indicating his ownership interest in and connection with two other corporations (Tr. 37). On January 18, 1966, petitioner filed in the district court an affidavit which stated that he had no interest and had never had an interest in the "D" Construction Corporation or the other named corporation about which information had been sought.

At trial the government proved that petitioner had in fact been president and 50% stockholder of "D" Concrete[2] Construction Corporation, which bought out "Elite" (Tr. 75–78, 88; G.X. 5, 6A, 7A, 7B, 7C) and continued to own a 50% interest until the company ceased doing business in 1964 (Tr. 79–80). Petitioner later admitted his 50% interest to the referee in bankruptcy (about one year after filing the false statements) but continued to deny having been president of the corporation (Tr. 45–48).

Petitioner's contentions that the evidence "affirmatively and conclusively negates" (Pet. 9) any intent

[2] The omission of the term "Concrete" in the affidavit concerning "D" Construction Corporation was apparently inadvertent. See Pet. App. 16.

to defraud and that the court's instruction on intent to defraud (which he requested) was erroneous because the trial judge defined "fraudulently" as with intent to 'deceive" are fully answered in the opinion of the court below on which we rely. See also *Tancer* v. *Wales*, 156 F.2d 627, 628 (C.A. 2); *In re Melnick*, 360 F.2d 918, 920 (C.A. 2); *United States* v. *Cury*, 313 F.2d 337, 342 (C.A. 3); *Diorio* v. *Kreisler-Borg Construction Co.*, 407 F.2d 1330 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972